(3) Supreme Court, U.S.
FILED
02 12 JUL 1 2002

No.

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In The

# Supreme Court of the United States

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*Christopher Langdon, Petitioner,*

*v.*

*Lyndo Tippett, Roy Cooper et al.*

consolidated with:

*Christopher Langdon, Petititoner,*

*v.*

*J.J. Swain, Jack Murdock, F.D. Martin et al.*

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On Petition for Writ of Certiorari
To The United States Court of Appeals
For the Fourth Circuit

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## APPENDIX, PART II, FOR PETITION FOR WRIT OF CERTIORARI

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35 pg

[EXHBIT #1]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION
CASE NO:1:01-CV-107

FILED: 2001 MAY 21
P.M. 2:09
U.S DIST. COURT
W. DIST. OF N.C.

CHRISTOPHER LANGDON,
PLAINTIFF,
v.
LYNDO TIPPETT, SECRETARY OF TRANSP. OF THE STATE OF NORTH CAROLINA; THE NORTH CAROLINA DEPARTMENT OF TRANSPORTATION (NCDOT); ROY COOPER, ATTORNEY GENERAL OF NORTH CAROLINA, THE STATE OF NORTH CAROLINA; THE NORTH CAROLINA DEPARTMENT OF JUSTICE & THE OFFICE OF ATTORNEY GENERAL,
DEFENDANTS

CIVIL RIGHTS COMPLAINT CHALLENGING THE CONSTITUTIONALITY OF NORTH CAROLINA STATUTES & FOR DECLARATORY JUDGEMENT AND INJUNCTIVE RELIEF & INCORPORATED MEMORANDUM OF LAW

(1) The plaintiff hereby seeks to have North Carolina General Statutes 136-103 through 136- 112, NCGS-40A-1, NCGS-1-51, NCGS 1-53 and NCGS –1-35 declared unconstitutional and that an injunction be issued barring the defendants from utilizing those statutes as defenses, or otherwise. The aforesaid statutes deny equal protection under the law, due process of law and a proper procedure for a redress of grievances against the government. Therefore, the aforesaid statutes are in violation of USCA's I, V, & XIV. More specifically:

(2) NCGS 136-111 is unconstitutional because it does away with prior notice before the taking of property and an opportunity to be heard. The only exception to the right to notice and an opportunity to be heard prior to a taking is in emergency situations. *See: Boddie v. Connecticutt,* 401 US 371 at 379 ; Davis v. Scherer, 468 US 183 at 200-201 (1984); *Wisconsin v. Constantineau,* 400 US 433, 91 S. Ct. 507 at 510; *Windsor v. Mc Veigh,* 93 US 274 (1876).

Particularly enlightening is the Court's ruling in *Fuentes v. Shevin,* 407 US 67 at 83, 92 S.Ct. 1983 at 1995 (1972). The Court has repeatedly held that "constructive notice" is not sufficient: *Mullane v. Central Hanover Bank & Trust Co.,* 339 US 306,

314, 70 S.Ct. 652, 657 (1950); *Schroeder v. New York City,* 371 US 208, 83 S.Ct. 279; *Mennonite Board of Missions v. Adams,* 462 US 791,103 S.Ct. 2706 (1983). The lower courts agree: *Miles v. District of Columbia,* 354 F. Supp. 577 (1973), 510 F. 2d 188 (1975). *See also: Caveness v. Raleigh C. & S. R. Co.,* 90 Se 244 at 246(N.C.S.Ct.-1916) The right to prior notice and opportunity to be heard before the taking of one's property is extended to all members of society, even the most downtrodden.

For example, prisoners are allowed prior notice and a hearing before their good time credits are taken away *Wolff v. McDonnell,* 418 US 539, 557 –558 (1974). Mental patients are allowed hearings before being deprived of their civil rights: *Zinermon v. Burch,* 494 US 113, 110 S.Ct. 975 (1990). Those aliens who are charged with being in this country illegally are entitled to notice and a hearing prior to being deported: *Kwang Hai Chew v. Colding,* 73 S. Ct. 472, 344 US 590.

States have always recognized the right to prior notice and opportunity to be heard when one's property is taken by a governmental entity: *See: Bernard v. Brewer,* Virginia Reports, Volume II, {77}, pages 99-100 (1795) ( this case was argued by John Marshall as a practicing attorney); *Case of Neeld's Road,* 1 Pa 353 at 355; *Stuart v.*

*Palmer,* 74 NY-29 Sickels (183) at(190) (New York-1878). North Carolina cases are in agreement: *Phelps v. Chesson,* 34 NC (197), page 189 (1851); *Marshall v. Lovelass,* 1 NC 412; *McMillan v. Robeson County,* 262 NC 413, 137 Se 2d 105 at 108 [4] (1964); *Mc Donald's Corp. v. Dwyer,* 338 NC 445, 450 Se 2d 888 at 891 [6] (1994); *Bowie v. Town of West Jefferson,* 57 Se 2d 369 at 371 [1] (1950); *Beaufort County v. Mayo,* 176 Se 753 at 755 (NC S.Ct.-1934). *Board of Commissioners of Roxboro v. Bumpass,* 233 N.C. 190, 63 Se 2d 144 at 147 [9-12] (1951). Because there is no requirement of prior notice and opportunity to be heard in NCGS 136-111 when the NCDOT takes property, it is in violation of USCA's I, V, & XIV.

(3) Federal law prohibits any federal employee from intentionally making it necessary for a property owner to institute legal proceedings to prove that a taking has occurred. *See:* 27 Am Jur 2d, EMINENT DOMAIN, Sections 826, 1108; 42 USCS 4651 (8); UEDC Section 213; Many states have the same prohibition: Alabama Codes-18-1A-33. The reason for this prohibition is that any government employee must inform a citizen of the taking of that citizen's property if they are aware of the taking. However, NCGS 136-111 has no such

requirement. NCGS 136-111 as written, and as interpreted in the NC courts, allows the NCDOT to simply take a citizen's property and say "sue us." This has happened on numerous occasions in N.C. Therefore, NCGS 136-111 violates USCA's I, V, & XIV.

(4) The Supreme Court of the State of North Carolina has repeatedly held that a statute which allows the taking of property without PRIOR notice and opportunity to be heard is unconstitutional: *Mc Donald's Corp. v. Dwyer,* 338 NC 445, 450 Se 2d 888 at 891 (N.C.S.Ct.-1994); *Bowie v. Town of West Jefferson, supra.* For NC to make an exception to this rule for the NCDOT is not equal protection under the law and due process of law.

There are other state's which agree that statutes which allow the taking of property without prior notice and opportunity to be heard are unconstitutional: *Violet's Heirs et al. v. City Council of Alexandria,* 53 Am St. Rep. 825, 23 Se 909 (Supreme Court of Virginia-1896); *Savannah F. & W. Ry. Co. v. Mayor of Savannah,* 96 Ga. 680 at 680 (Ga.S.Ct.-1895); *Dodd v. Hart,* 68 A. 397 at 397 [1] (Court of Chancery of Deleware-1900); *Janes v. West Puerto De Luna Community Ditch,*169 P. 309 at 310 (Supreme Court of New Mexico-1917); *Re*

*Opinion of Justices,* 313 Ne 2d 561 (Mass.)

(5) NCGS 136-111 and NCGS 136-112 do not, as far as I am aware, appear in the Index to the N.C. General Statutes. I have checked under "Dept. of Transp.," "Transp. Dept.," "N.C. Dept. of Transp.," " Just Compensation," "Taking," "Inverse Condemnation," "Condemnation" and "Eminent Domain." If NCGS 136-111 is an exclusive remedy, as the courts in NC have ruled, notice that the statute exists must be given. The government can't hide the existence of a statute, expect a citizen to be aware that it exists and then punish them if they don't comply with it. Notice that a statute exists is particularly important for pro se party, particularly if they live in a remote county with no law library. From 1980 to 1998 I lived in Polk county N.C. which has no law library. However, a copy of the NC General Statutes was available.

The failure to include NCGS's 136-111 and 112 in the Index is particularly harmful to pro se parties who can't afford legal representation, thus, it is an economic, class based discrimination. This type of discrimination is unconstitutional: *Harper v. Va. Board of Elections,* 383 US 663 (1966).

The failure to give proper notice to the general public that NCGS 136-111 and 136-

112 exist is a denial of due process of law and equal protection under the law in violation of USCA's I, V and XIV.

(6) NCGS 136-111 states that a property owner may file a complaint within two years of the taking. However, it does not specify what happens when a taking is caused by a series of events over a period of time, rather than by a single event. The US Supreme Court addressed this question in *US v. Dickinson,* 331 US 745, 67 S.Ct. 1382 at 1384-1385 (1947). In that case the Court ruled that when a taking occurs over a period of time, a statute of limitations, if any, does not begin to run until the taking is complete.

The reason for this rule is to avoid premature and multiple lawsuits. *See also Gregorio P.Castro v. U.S.,* 500 F. 2d 436 at 440 (1974); *Barbaccia v. County of Santa Clara,* 451 F. Supp. 260 at 266 (1978); *Juda v. U.S.,* 6 Cl. Ct. 441 (1984); Silverberg *v. U.S.,* 155 Ct. Cl. 436 (1961); *Avery v. U.S.,* 300 F. 2d 640 (1964); *Terteling v. U.S.,* 334 F. 2d 250 (1964); *Pierpont Inn v. California,* 449 P. 2d 737 (1969).

Rather than running any statute of limitations from the time that the taking is complete, the courts in N.C. have been known to run a statute of limitations for a taking from the first injury, no matter how

small it might be, regardless of whether or not the taking is complete: *Robertson v. City of High Point,* 497 Se 2d 300 (N.C. App.-1998). NCGS 136-111, as written and as interpreted, does not ensure that the suggested statute of limitations, if applicable, runs from the last event in the taking, rather than the first, therefore, NCGS 136-111 is in violation of USCA's I, V, & XIV.

( 7 ) NCGS 136-112 states that interest should run from the date of the taking. However, when a taking occurs by a series of events over a period of time, rather than by a single event, the federal courts have ruled that interest should run from the midpoint of the taking: *Drakes B.L. Co. v. U.S.,* 459 F. 2d 504 at 511-512, 198 Ct. Cl. 598 at 608 (1965); *Fonnaledes v. U.S.,* 107 F. Supp. 1019, 1022, 1023, 123 Ct. Cl. 483, 503-504 (1952); *Gregorio Castro v. U.S.,* 500F. 2d 436 at 443 (1974). Therefore, NCGS 136-112 is not constitutional and is in violation of USCA's I, V & XIV.

( 8 ) NCGS 136-111 is unconstitutional because it is too vague. A "taking" has been recognized as substantial damage to a citizen's property which creates a servitude or easement on the property: *U.S. v. Dickinson,* 67 S. Ct. 1382 at 1383 (1947); *Wade v. Car. Tel. & Tel. Co.,*147 N.C. 219, 60 Se

987 at 988 (S.Ct. of N.C.-1908); *Geer v. Durham Water Co.,* 37 Se 474 At 475.

The question is "What amount of damage must be reached to create a taking?" Historically, if the damage to the citizen's property was not substantial enough to be a taking, it was considered a tort and no compensation was available, unless the government had waved its sovereign immunity with regards to tort claims.

" The distinction is made between a 'taking' and 'damage.' Compensation to the owner required as to the former, but not as to the latter." *Kirkpatrick v. City of Jackson-ville D.H.U.D.*,312 So. 2d 487 at 489 (Fla.)

" Continuing trespass or nuisance may ripen into a taking." *City of Jacksonville v. Schumann*, 167 So. 2d 95 at 95 [3] (Fl.-1964).

" Property is not 'taken' within meaning of takings clause of State Constitution if it is simply damaged." *Hawkins v. City of La Grande*, 843 P. 2d 400 (Oregon)

*See also: Sanguinetti v. U.S.,* 264 US 148 at 149 (1924).

Because of the confusion as to what level of damage was necessary to reach the level of a taking, most states now have constitutional amendments which require just compensation for the 'taking' *and* 'damaging' of property by the government.

The first to do so was Illinois in the 1870's. North Carolina is not one of those states. Therefore, a plaintiff must wait until the damage reaches the level of a taking before his cause of action accrues. Unfortunately, North Carolina has at least three different definitions as to what minimum level of damage constitutes a taking:

" And 'taking' under the power of eminent domain may be defined as.. 'informally appropriating or injuriously affecting it [property] in such a way as *substantially* to oust the owner and deprive him of *all* beneficial enjoyment thereof." *Penn v. Coastal*, 231 NC 481at 484 (1950).

Is a taking a complete destruction of value, or is it substantial damage? The quote above contains two different definitions of a taking because it gives two different levels of damage necessary to constitute a taking. Substantial damage can be less than a complete destruction of value, perhaps much less, depending on a particular judge's, or jury's interpretation of the word "substantial." "Substantial" is a subjective term. Some may consider a 10 % diminution in value substantial, others 25%, 50%, or 75%. Is $500 worth of damage substantial? Is $1,000 worth of damage substantial? Is $5,000 worth of damage substantial? The above definition of a

'taking' appears in several NC cases and is cited in the case notes of the NC General Statutes. Another definition of a taking is:

" In inverse condemnation action, prima facie showing of ***substantial*** physical damage measurable in monetary terms is required." *Lea v. N.C. Board of Transp.*, 291 Se 2d 844 at 845 [12] (N.C. App.-1982), 304 Se 2d 164 at 166 [14] (N.C.S.Ct.-1983)

The NC Court of Appeals has further confused the matter by stating in *Robertson v. City of High Point,* 497 Se 2d 300 (1998) that any statute of limitations for inverse condemnation runs from the first injury. One can draw two conclusions from that: (A) The court believes that a 'taking' is a any injury, no matter how small, or; (B) The statute of limitations for a taking can begin running before a cause of action accrues.

For example, if a NCDOT road/dam malfunctions and destroys Mr. Abercrombie's barn, doing $20, 000 worth of damage, the damage would probably be considered substantial enough to be a taking. The statute of limitations, according to *Robertson*, would begin to run when Abercrombie's cause of action accrued.

However, if the same road/dam caused $200 damage to Barnaby's property, the purported statute of limitations would, according to *Robertson,* begin running,

although the damage was not substantial enough to be a taking.

If Barnaby's property was injured again a year later by the same structure in the amount of $400, Barnaby still couldn't sue for a taking. If Barnaby's property was injured again in the amount of $25,000, 26 months after the first injury, Barnaby couldn't sue because, according to *Robertson,* the statute of limitations began to run from the first injury and had expired before his cause of action had accrued. Under *Robertson,* plaintiffs have different time periods, or none at all, for filing.

In states which have constitutional bars against the taking of property, without a bar against damaging property, the courts and plaintiff's are faced with the difficult task of determining when the damage rises to the level of a taking.

" No simple test exists for determining when a taking occurs...a particularized judgment of the facts of the individual case is necessary." *Jensen v. U.S.*, 305 F. 2d 444 (1962)

The *Robertson* rule is a simple rule that is basically a tort rule. However, courts throughout the U.S. have always held that a 'taking' is not a tort.

" Constitutional provision against taking private property ...without adequate compensation..that liability is not in tort."

29A CJS, Eminent Domain, Sect. 375, page 745.

Generally, the federal courts require a high amount of damage to constitute a taking. In *Sanguinetti v. US,* 264 US 148 at 149, the Court cited *US v. Cress,* 243 US 316, in which the value of Cress' property was diminished by 50%, therefore, a "taking" had occurred. I am not asserting that the courts in N.C. must accept the federal levels of damage that trigger a taking. States may be more protective of constitutional rights than the federal government. Many states allow a small level of damage to constitute a taking (I believe S.C. is one).

Whatever level of damage that N.C. decides constitutes a taking, it must be consistent. If a plaintiff is to comply with a statute of limitations for a taking, particularly a pro se plaintiff, there must be a uniform definition of a "taking." In NC it has been defined as a complete destruction of value, a substantial diminution of value and, by inference, a small injury.

Therefore, NCGS 136-111 and NCGS 136-112 are in violation of USCA I, USCA V & USCA XIV.

(9) A more complete definition of a taking is a substantial interference with a property right. Property is not a physical thing but a

bundle of rights; the right to sell, to enjoy, to use and to damage the physical entity, are all property rights. Whenever a government entity exercises one of these property rights, it must pay just compensation. For example, if a government floods private property, it is both using and damaging the property. Joe Smith may flood his own property, even if it diminishes its value. However, the government must pay just compensation if it substantially damages/uses a citizen's property.

Historically, in N.C., whenever a government agency used/damaged private property substantially, without resorting to the statutory condemnation proceedings (particularly notice and opportunity to be heard), the property owner had until the expiration of the period of adverse possession/prescription to file a complaint for just compensation. *State v. Fisher,* 23 SE 158 (Supreme Court of N.C.-1895). Upon payment of just compensation, sometimes called permanent damages, the appropriator acquired an easement/ servitude to continue the damage/use.

A physical invasion of the land was not required, as claimed in *Lea v. BOT, supra.* In *Geer v. Durham Water Co.*, 37 Se 474 the upstream prevention of the normal flow of water to the plaintiff's property was deemed an appropriation of an easement. Because

the appropriator had not used the statutory condemnation procedures, the 20 year time limit of adverse possession/prescription was applicable. This was the ancient, common law remedy under the Magna Carta: *Bowman v. Middleton,* 1 Bay 252 at 253-254 (S.C.-1792). *Mo. & N. A.R. Co. v. Chapman,* 234 Sw 171 (S.Ct. of Ark.-1921). *See also: Caveness v. Railroads* 172 NC 305, 90 Se 244; *Land v. Railroad,* 107 NC 72, 12 Se 125; *Livermon v. Roanoke & T.R.R. Co.,* 109 NC 52, 13 Se 734 (1891); *Query v. Postal Tel. &Tel. Cable Co.,* 101 Se 390 at 391; *Carolina & N.W. R. Co. v. Piedmont Wagon,* 51 Se 2d 301.

Most states (approximately 35) agree that if a government body or a quasi-public corporation appropriates a property interest without utilizing the statutory condemnation procedures, including notice and opportunity to be heard, the plaintiff property owner has the right to file suit for just compensation until the expiration of the period of adverse possession/ prescription. *See: Aylmore v. City of Seattle,* 171 P. 2d 659 (extremely explanatory); *White Pine Lumber Co .v. City of Reno,* 801 P. 2d 1370 (Nevada-1990); *Carter v. Ridge Turnpike Co.,* 208 Pa. 565, 57 A. 988 (1904); *Faulk v. Mo. River & N.W. R. Co.,* 28 SD 1, 132 NW 233 at 237(1911); *Ackerman v.* Port *of Seattle,* 55 Wash. 2d 400, 348 P. 2d

664; *Frustruck v. City of Fairfax,* 28 Cal. R. 357 at 361 [45-48] (1963); *Fairbanks v. N. Stor. Bor. v. Lakeview Enterp.,*897 P. 2d 47 at 54 (Alaska-1995); *Underwood v. Dept. of Transp.,* 849 P. 2d 1113 at 1117 Oklahoma-1993); *Barker v. St. Louis Cnty.,* 104 Sw 2d 371 (Mo.-1937); *Galway v. Metropolitan El. R. Co.,* 28 Ne 2d 479 (NY-1891); *Di Santo v. Warrenville,* 376 Ne 2d 288 at 289 (Ill.-1978);*Gray v. Haas,* 67 Nw 394 (S.Ct. of Iowa-1896); *Tucker v. Chicago, St. P. M. & O. Ry. Co.,* 65 Nw 515 (S.Ct. of Wisconsin-1895); *Schilling v. Carl T. P., Grant Cnty.,* 235 Nw 126 (S.Ct. of N.D.-1931); *Fries v. Wheeling & L.E. Ry. Co.,* 46 Ne 516 (Ohio S.Ct.-1897); *Jinkins v. City of Jal,* 386 P. 2d 599 (N.M.-1963); *Maricopa Cnty. v. Warford,* 206 P. 2d 1168 (Ariz.-1949);*Cheyenne Airport Board v. Rogers,* 707 P. 2d 717 (Wyo.-1985); *Sundell v. Town of New London,* 409 A. 2d 1315 (S.Ct.of N.H.); *Appeal of Kraus,* 618 A. 2d 1070 (Penn.-1992); *Kime v. Cass Cnty.,* 101 Nw 2 (S.Ct. of Nebraska-1902); *Chenevert v. La. St. Dept. of Hwys.,* 345 So 2d 960 at 960 [3] (1977); *Mc Farlan v. Morris Canal & Banking Co.,* 44 NJ Law 471 at 472 (NJ-1882); *Tarrant Co. v. Reid,* 203 Sw 2d 290 at 293 (Texas-1947); *Hiji v. City of Garnett,* 804 P. 2d 950 at 955 (Kansas-1951); *Salt Lake Inv. Co. v. Oregon Short Line Co.,* 148 P. 439 at 441 (S.Ct.of

Utah-1915), citing *Land v. Railroad, supra.*; *Katsos v. Salt Lake City Corp.,* 634 F. Supp. 100 (1986); *Scates v. Indianna Hwy. Comm.,* 383 Ne2d 491 (1978); *Rosenthal v. Crystal Lake,* 525 Ne 2d 1176 (Ill.-1988); *State Hwy Comm. v. Stumbo,* 352 P. 2d 478 at 479 (Ore.-1960); *Di Franzo v. Village of Port Sanilac,* 419 Nw 756 (Mich.-1988); *Yazoo-Mississippi Delta Levee Board v. Dancy,* 3 So. 568 (Miss.-1888).

Further evidence that a plaintiff is not bound by any statute of limitations for a taking is the Supreme Court of N.C.'s ruling in *Hoyle v. City of Charlotte,* 276 NC 292, 172 Se 2d 1(1970).

" The common law action for inverse condemnation has been recognized by this court..." *Hoyle v. City of Charlotte.*" Long v. City of Charlotte, 293 Se 2d 101 at 108 [4] (NCSCt.1982).

" D.C.N.C.-1981. Under North Carolina law, there is no statute of limitations applicable to a claim for just compensation and, thus...plaintiff is entitled to just compensation under the Constitution regardless of when the taking occurs and the time of the is relevant for purposes of valuing just compensation due...*Ocean Acres Ltd.* Partnership *v. Dare Cnty. Board of Health,* 514 F. Supp 1117, affirmed 707 F. 2d 103." West' Federal Digest, key 288 (1) 35 FPD 3d 256.

*See also: West's NC Digest,* Exhibit 1. Of course, the defendants can cite statutes which state that NCGS 136-111 is an exclusive remedy, including the 2 year suggested statute of limitations. According to Shepherd's Citations, *Hoyle* has never been vacated or overruled. It is clear that NCGS 136-111 is unconstitutional because it violates the rights to due process of law and equal protection under the law as guaranteed in USCA I, V & XIV.

(10) In N.C. the plaintiff is not required to utilize the statutory remedy (and the statute of imitations therein) when the appropriator does not utilize the statutory procedures. *See: Eller v. Board of Education,* 89 Se 2d 144 at 145 [7] (NCSCt-1955); 29A CJS, EMINENT DOMAIN, Section 376, page 747, citing *Lowman v. Abee,* 131 Se 277, 191 NC 147; *Mason v. Commissioners,* 96 Se 110 at 110 [1] (NCSCt-1918); *White v. Nw. N. C. Ry. Co.,* 18 Se 330 at 334 (NCSCt-1893). Other jurisdictions agree: *Hamor and others v. Bar Harbor Water Co.,*78 Me 127, 3 A. 40 at 40 (1886); *De Salvo v. Arkansas La. Gas Co.*, 239 Fed Supp. 312 (E.D..Ark.), cited in 27 Am Jur 2d, Sect. 823, page 341-342; *Cook v.Lehigh Valley R. Co.,* 181NYS 217 at 220 (NY-1920). Also, the cases cited in the previous section (#9) are in agreement. This is

because the statutory condemnation proceedings are in derogation of common right and are mandatory. The condemnor must prove compliance with the mandatory statutory procedures to effect a legal taking. *See: State v. Core Bank Properties,* 275 NC 328, 167 Se 2d 385 at 385 [1] (NCSCt.-1969); *N.C. St. Ports Authority v. South Felt,* 161 Se 2d 47 at 49; *Carolina & Nw.T. Ry. Company v. Penncarden L. & Mfg. Co.,* 44 Se 358, 361 (NCSCt-1903); *City of Charlotte v. McNeely,* 8 NC App. 649, 175 Se 2d 348 at 351 [1-3] (1970); *Cook v. Lehigh Valley R. Co., supra.*; *Bernard v. Brewer,* 2 Wash. 76, Virginia Reports, Volume II, page 99 (1795) (argued by John Marshall).

NCGS 136-103 states that:

" In case condemnation shall become necessary the Department of Transportation shall institute a civil action."

Strangely, the courts in N.C. allow the NCDOT to escape the mandatory statutory requirements in NCGS 136-103 through 136-110.

(11) There is other evidence that NCGS 136-111 is a special law for the NCDOT. It has already been shown herein that in N.C. when the appropriator fails to utilize the mandatory statutory procedures, the plaintiff is not required to utilize the statu-

tory remedy and his right to file a complaint doesn't expire until the end of the period of adverse possession/prescription. In the late 1800'lthe N.C. Legislature passed special laws for some railroad companies which limited the time in which plaintiffs could sue for just compensation for unauthorized takings: *See: Teeter v. Postal Telegraph Co.,* 90 Se 941 at 942 (NCSCt.-1916).

This began the process in which similarly situated plaintiffs were granted different times in which to file complaints for just compensation, depending upon whether there was a taking by private individuals, quasi-public corporations, municipalities or state agencies. Such arbitrary classifications are a denial of due process of law, equal protection under the law and the right to a redress of grievances against the government. Statutory classifications must treat similarly situated individuals alike: *Reed v. Reed,* 404 US 71, 92 S.Ct. 251; *Hooper v. Bernalillo Cnty. Assessor,* 472 US 612, 105 S. Ct. 2862 (1985). This is true with regards to time periods for filing complaints.: *Picket v. Brown,* 462 US 1, 103 S. Ct. 2199 (1983). What NC did was lessen the period of adverse possession/ prescription for some entities, but not all.

NCGS 136-111 is a special limitation for filing complaints against a particular state agency, the NCDOT. It does

not apply to other state agencies, qausi-public corps., municipalities or controversies between private individuals.

Under NCGS 146-24 state agencies, after making an attempt to purchase property from citizens, are authorized to use the condemnation procedures under NCGS 136. NCGS 136-111 does not require that the NCDOT first make an attempt to purchase the property appropriated. Attempts to purchase are notice, albeit not necessarily adequate constitutionally. There is nothing in NCGS 146-24 or NCGS 136-111 that requires property owners whose property rights have been substantially interfered with by state agencies other than the NCDOT, to file a complaint within two years.

For example, if Albert' property is damaged by a road put through his property by the NC Dept. of Corrections without the utilization of the statutory procedures and constitutional safeguards, Albert may treat the taking as legal (See: *Aylmore v. City of Seattle,* 171 P. 2d 659)and prevent the creation of an easement or servitude upon his property, if he files a complaint within 20 years (NCGS 1-40). This might be seven years under NCGS 1-38.

If the same inroads on Albert's property rights are made by a private citizen, he has twenty years, or seven years to file a com-

plaint. If the inroads on his property rights are made by a railroad, he would have 2 or 5 years, depending on the circumstances, to file a complaint under NCGS- 1-51. This statute is vague and contradictory.

If the same inroads on Albert's property rights are made by a quasi-public corporation (railroads excluded) or by a municipality, he has three years in which to file a complaint (NCGS-40A-51). *Robertson v. City of High point, supra.* Under the same circumstances, he has only two years to file a complaint if the inroads on his property rights are made by the NCDOT.

Strangely, the NCDOT can *intentionally* ignore all statutory and constitutional safeguards and put a road through a citizen's property and acquire an easement within two years under NCGS 136-111. *See: Ledford v. N.C .St .Hwy. Comm.* 279 NC 188, 181 Se 2d 466 (1971).

However, the state of N.C. has 30 or 21 years in which to prevent the uncompensated acquirement of an easement upon its property under NCGS-1-35. The only legitimate, constitutionally valid reason for a statute of limitations is to prevent the prosecution of stale claims. However, it is ludicrous to hold that a claim against the state grows sale in two years, while the state's claim under the same circumstances grows stale only after 30 years; that

a claim against this stale after two years, while claims against other state agencies are stale only after twenty years; that a claim against the NCDOT is stale after two years and an identical against a municipality grows stale after three years. Statutes of limitations which discriminate in the favor of governments and against the citizenry are unconstitutional: *Reich v. State Hwy. Dept.,* 194 Nw 2d 700 at 700 [2] (S.Ct. of Mich.-1972); *O'Neil v. City of Parkersburg,* 237 Se 2d 504, 508, 509 (Supreme Court of Appeals of W. Virg.- 1977); *Miller v. Boone Cnty. Hosp.,* 394 Nw 2d 776 at 779 (S.Ct. of Iowa-1986). *Turner v. Staggs,* 510 P. 2d 879 (Nev.S.Ct.-1973), cert. den. 414 US 1079. *Hutchingsv. Kraject,* 215 NE 2d 274 (Ill.-1966); *Lorton v. Brown,* 220 Ne 2d 161.

There are only two reasons for giving plaintiffs a shortened period of time to file complaints against government agencies like the NCDOT, neither of which is constitutional. The first is to save the state money by limiting the number of valid claims pursued: *Hunter v. N. Mason High School,* 539 P. 2d 845, 850 (S.Ct. of Wash.-1975); The second is for the administrative convenience of the NCDOT. NCGS 136-111 allows the NCDOT to avoid all the time and expense of utilizing the statutory procedures in NCGS 136-103 through 136-110. However, administrative convenience is not

a legitimate reason to discriminate in statutes: *Frontiero v. Richardson,* 411 US at 689, 93 S.Ct. at 1772 [3-5] (1973).

I am not stating that the period of adverse possession/prescription is the proper time limit to file a complaint for an appropriation of a property interest by the federal government when the statutory procedures have not been utilized by the federal government. The federal government has no laws or time limits with regards to adverse possession/prescription. The federal government does not allow a citizen to acquire an easement or create a servitude upon federal land at all. The federal government does have one statute of limitations for a taking by the federal government when the statutory condemnation procedures aren't used. That is the six year limitation in the Tucker Act. It applies to all takings without notice, etc., by all federal agencies.

The federal government does not have one statute of limitations for takings by the Dept. of Defense, another for the USDOT and another for the Dept. of Treasury. The federal government does not have one time limit for complaints by citizens for the taking of their property by the government and another for the government to file claims against private citizens to prevent the taking of a property interest, as North

Carolina does.

" Once right or privilege is granted it must be applied equally and indiscriminately." *State v. Stafford*, 164 Se 2d 371 at 372 [15] (N.C.S.Ct.-1968).

Therefore, NCGS 136-111 is in violation of USCA I, USCA V & XIV.

(12) NCGS 136-111 is not constitutional in the way that is interpreted by the courts in NC and as utilized by the defendants. NCGS 136-111 states that a property owner ***"MAY"*** file a complaint within 24 months of the taking. "May" in statutes is permissive. *Felton v. Felton,* 195 Se 533 at 533 [3] (Supreme Court of N.C.-1938) This is particularly true where "may" and "shall" are both used in the statute: *See: Curlee v. National Bank of Fayetville,* 121 Se 194 at 197 (N.C.S.Ct.-1924); *Kelly v. City of Cedar Falls,* 123 Iowa 660, 99 Nw 556 at 557, last paragraph (1904); *Jenney v. Assessors of Mattapoisett,* 76 Ne 2d at 126[2] (Mass.-1947); *Scannel v. City of Seattle,* 648 P. 2d 435, 436 [2] (S.Ct. of Wash.-1982). *Samuel v. American Mortgage Co.,* 78 Sw 2d 1036 at 1037 [3] (Texas-1935); *Moraitis v. Delany,* 46 F. Supp. 425 at 426 [10] (Maryland-1942); *Billings Utility Co. v. Fed. Res. Bank ,* 46 F. Supp. 691 at 692 [5] (1942); *Weiner v. Hospital,* 144 A. 2d 575 at 575 [2]; *Continental Cas. v. Rio Grande Fuel,*

119 P. 2d 618, 618 [1] (1941); *Matter of Fasi,* 634 P. 2d 98 at 101 [4-6]( Hawaii-1981); *Federal Land Bank v. Hansen,* 113 F 2d 82 at 84 (1940): *See: Sutherland's Statutory Construction, 5th Edition,* Section 57.11, page 31.

Please note that NCGS 136-107 uses the mandatory "shall" with regards to the statute of limitations therein. It is obvious that the legislature intended that the statute of limitations in136-107 was intended as mandatory and the statute of limitations in 136-111 was intended as permissive.

Further evidence that NCGS 136-111, particularly the statute of limitations therein, is permissive, not mandatory is the fact that there is no penalty for failing to abide by the statute of limitations in 136-111. *See: State v. Schade,* 167 Sw 2d 135 at 136 [8] (Mo.-1943); *Meister v. Moore,* 96 US 76, 24 L. Ed 826 at 826 [1] (1877); *Duthchess Cnty. Mut. Ins. Co. v. Van Wagonen,* 30 Ne 971 at 972 (NY App.-1892); *Juliand v. Rathbone,* 39 NY 369 at 372 (1868); *Sutherland's Statutory Construction,* 5th Ed. (1992-1993), Section 57.08, page 24, last paragraph.

Additional evidence of a permissive interpretation of 136-111 is the fact that there are no negative words in the statute with regards to the statute of limitations, particularly negative words restraining the

filing of a complaint after the suggested 24 months. This is an ancient rule of statutory construction: *See: Townsend's Case,* 75 English Reports 173 at 175, 177, (England-1554 A.D.) *Pond v. Negasus,* 3 Mass 230, 3 Am Dec 131 at 132 (1807); *Dutchess Cnty. Mut. Ins. Co. v. Van Wagonen, supra; Diamond Match Co. v. U.S.,* 181 F. Supp. 952 at 953,959 (1960); *Sutherland's Statutory Construction,* 5th Edition (1992-1993), Section 57.08, page 24, last paragraph. There is a penalty for failing to abide by the statute of limitations in NCGS 136-107, not for NCGS 136-111.

Furthermore, there is nothing in the 136-111 that states that it is the exclusive remedy and that other remedies are repealed. It has already been shown herein that there is a common law remedy for the taking of property without just compensation under the Magna Carta and a remedy under the N.C. Constitution. In fact the term "Law of the Land" in the N.C. Constitution comes from the Magna Carta.

No repeal of the common law is to be presumed, repeal by implication is not acceptable. *See:* 29A CJS, EMINENT DOMAIN, Section 376, p. 747; *Allen v. Standard Crankshaft & Hydraulic Co.,* 210 F. Supp. 844 at 846 [16](W.D.N.C.-1962); *Farrington against Lee,* Case 191, 86 English Reports 1092 at 1092 (England

1600's); *Wetmore v. Tracy,* 14 Wendell 252 at 253 (NY 1835); *Newman v. District of Columbia,* 518 A. 2d 698 at 703 (DC-1968); *Skorpios Properties v. Waage,* 172 Conn. 152, 374 A. 2d 165 (1976); *Hardy v. State,* 482 A. 2d 474 at 474 [1] (Maryland-1984); *U.S. v. Professional Air Traffic Controllers,* 653 F. 2d 1134 at 1135 [5] (1981); *Scharfield v. Richardson,* 133 F. 2d 340 at 341[2-5]; *Sand Key Associates v. Board of Trustees,* 458 So 2d 369 at 369 [4] (Fl.-1984); *Allen v. Houn,* 757 at 757 [4] (Wyo. S. Ct.-1923); *Pineo v. White,* 70 Ne 2d 294 at 295 [16] (Mass.-1946); *Bruce v. Schuyler,* 4 Gilman 221, 46 Am Dec 447 at 448 (Ill.-1847); *Sutherland's Statutory Construction,* 5th Edition; *Hummer v. Schools of City of Hartford,* 112 Ne 2d 891 (Indiana-1953): *Souza v. O'Hara,* 395 A. 2d 1060 at 1060 [4] (S.Ct. of R.I.-1978); *Bolduc v, Herbert Schneider Corp.,* 374 A. 2d 1187 at 1188 [2] (S.Ct. of N.H.-1977); *Ferguson v. Joliet Mass Transit,* 526 F. Supp. 222 at 222 [1] (1981).

Because there is nothing in 136-111 that eliminates the common law remedy under the Magna Carta and the constitutional remedy under the NC Constitution, 136-111 is merely cumulative, not exclusive. *See: City of Zanesville v. Fannan,* 53 Ohio 605; *Juliand v. Rathbone,* 39 NY 369 (1868); *Cook v. Lehigh v. R. Co.,* 181 NYS

217; *Farrington against Lee,* 86 English Reports at 1092 (England 1600's); *City of Atlanta v. Hunnicutt,* 22 Se 130 at 132 (S.Ct. of Ga.- 1894); *City of Rock Hill v. Cothran,* 40 Se 2d 239 at 239 [9] (S.C.S.Ct.- 1946); *Proprietors of Fryeburg Canal v. Frye,* 5 Maine 38 at 43 (1827); *Schuykill Navigation Co. v. McDonough,* 33 Penn 73 at 73 (1859). Therefore, rulings that indicate that NCGS 136-111 is the exclusive remedy for an unauthorized taking by the NCDOT are in violation of USCA I, USCA V & USCA XIV.

(13) According to the courts in NC, before proceedings are taken under NCGS 136-111, the courts are to proceed under NCGS 136-108: *See: Lautenslager v. Board of Transportation,*212 Se 2d 551 at 552 (N.C. App.-1975). However, no mention of NCGS 136-108 is made in NCGS 136-111 and no mention of NCGS 136-111 is made in NCGS 136-108. Therefore, NCGS 136-111 does not give proper notice of what procedures are to be taken under it, denying due process of law and equal protection under the law. In addition, courts in NC have not enforced this rule of law in all situations.

Therefore, NCGS 136-111 violates USCA I, USCA V & USCA XIV.

(14) Returning to *Robertson v. City of*

*High point, supra,* it should be noted that the NC Court of Appeals ruled that the statute of limitations for a taking runs from the first injury. However, NCGS 136-111 states that the suggested statute of limitations runs from the "taking." The statute never uses the term "first injury" or "injury" at all. In fact NCGS 136-103 through NCGS 136-112 uses some form of the word "taking" 60 times. The term "first injury" never appears in those statutes at all. What the NC Court of Appeals did in *Robertson* was to rewrite the statute and over-throw the legislative intent. Therefore, NCGS 136-111 is in violation of USCA I, USCA V & USCA XIV.

(15) In North Carolina there is a rule of law that a government entity with the power of eminent domain eminent domain shall not plead a statute of limitations as a defense and, at the same time, deny the plaintiff's right to recover. The denial of liability may be a denial of the plaintiff's ownership. See: *Mason v. Commissioners of Durham Cnty.,* 96 Se 110 at 11 (NCSCt.-1918);*Keener v. Asheville,* 177 NC 4, 97 Se 725; *Fleming v. Congleton (Pitt Cnty.),* 177 NC 186, 98 Se 449; *Kistler v. City of Raleigh,* 136 Se 2d at 79 [1] (NCSCT.-1964); " ..where the owner brings an action for damages, the appropriator, by denying

liability for damages and the plaintiff's ownership, may waive its right to insist that the statutory method should have been pursued." 27 Am Jur 2d, Eminent Domain, Section 823, page 341, citing *Rouse v. Kinston*, 188 NC 1, 123 Se 482, 35 ALR 1203.

In *Mason v. Commissioners, supra,* the defendants eventually admitted the plaintiff's ownership. However, because they continued to deny the plaintiff's right to recover, the plaintiff was not required to follow the statutory remedy. However, one court has ruled that this rule does not apply to the NCDOT. See: *Latham v. State Hwy. Commn.,* 131 Se 385 (NCSCt.-1926).

To excuse the NCDOT from the rule of law outlined above is not equal protection under the law and due process of law. Therefore, NCGS 136-111 is in violation of USCA I, USCA V, USCA XIV.

(16) In N.C., certain condemnors, including municipalities, are required to make a good faith effort to purchase property before appropriating it by other means. However, the courts and the N.C. legislature have relieved the NCDOT of this obligation, through the special, discriminatory laws in NCGS 136-103 et seq. See: *City of Charlotte v. Robinson,* 163 Se 2d 289 (1968).

Therefore, NCGS 136-103 through NCGS 136-111 are unconstitutional and in violation of USCA I, V & XIV.

(17) NCGS-1-51 allows the taking of property by a railroad in two years or five years when the statutory condemnation proceedings haven't been followed. It has already been shown herein that the time period for filing complaints for takings outside the statutory method have historically been twenty years. NCGS –1-51 allows the acquirement of an easement in only two years or five years. Property owners in N.C. have 2 years, 3 years, 7 years, 20 years, 21 years or 30 years in which to file a complaint to prevent the uncompensated acquirement of an easement upon their property, depending on who the property owner is and who the acquirer is.

Therefore, NCGS-1-51 is in violation of due process and equal protection under the law in violation of USCA V & USCA XIV.

(18) NCGS 1-52 states that the statute of limitations upon a contract is three years. NCGS-1-53 shortens the statute of limitations to two years for complaints against municipalities upon a contract. Therefore, NCGS-1-53 is a special law for municipalities and denies due process of law and equal protection under

the law, violating USCA I & XIV.

(19) NCGS 40A-51 allows the taking of a property interest, without the use of the mandatory statutory condemnation procedures, in 3 years, which is a different time limit than similarly situated people have under different statutes, as outlined in this complaint.

Therefore, NCGS 40A-51 denies due process of law and equal protection under the law, in violation of USCA I, USCA V & USCA XIV.

(20) NCGS-1-35 gives 21 or 30 years to the state to file a complaint when similarly situated entities in N.C. have considerably less time under other statutes, i.e. 2, 3, 5, 7 or 20 years, as described herein. Therefore, NCGS-1-35 denies due process of law, equal protection under the law in violation of USCA I, USCA V & XIV.

(21) Respectfully, the plaintiff asks for the following relief: (A) That the statute of limitations in NCGS 136-111 be declared unconstitutional and in violation of USCA I, USCA V & USCA XIV, or, alternatively, that the statute of limitations in NCGS 136-111 be declared permissive, not mandatory; (B) That an injunction be issued barring the defendants from pleading the statute of

limitations in NCGS 136-111 as a defense; (C) That NCGS 136-112 be declared unconstitutional and in violation of USCA I, USCA V, & USCA XIV; (D) That an injunction be issued barring the calculating of interest from any date earlier than the midpoint of the taking, when the taking occurs over a period of time, in any complaint for just compensation for the uncompensated taking of property by any entity with the power of condemnation; (E) That the statutes of limitations in NCGS-40A-51, including the 3 year statute of limitations granted by the courts under 40-51, be declared unconstitutional in violation of USCA I, USCA V & USCA XIV; (F) That an injunction be issued barring the defendants, local condemnors, corporations and any other entities from pleading the defense of the 2 or 3 year limitations in NCGS 40A-51; (G) That NCGS –1-51 be declared unconstitutional and in violation of USCA I, V & XIV for the reasons stated in this complaint; (H) That an injunction be issued barring the any entity from pleading the statutes of limitations in NCGS-1-51 as a defense; (I) That NCGS –1-35 be declared unconstitutional and in violation of USCA I, USCA V & USCA XIV for the reasons stated in this complaint; (J) That the defendants be barred from pleading the statutes of limitations in NCGS-1-35 as a defense in

any proceeding; (K) That NCGS 136-103 through 136-110 be declared unconstitutional and in violation of USCA I, V & XIV; (L) That an injunction be issued barring the defendants from pleading any statute of limitations contained in NCGS 136-103 through 136-111 as a defense if the defendants have not made a good faith effort to purchase the property. (M) That NCGS –1-53 be declared unconstitutional and in violation of USCA I, XIV. (N) That an injunction be issued barring any municipality or other entity from pleading the statute of limitations contained in NCGS –1-53; (O) That the court keep in mind that the right to just compensation for the taking of property is a civil right; that civil rights' complaints, particularly those of pro se parties, are to be liberally construed; that statutes providing a remedy for just compensation for the appropriation of property are to be strictly construed with regards to whether or not the common law remedy is abrogated and liberally construed to protect the rights of property owners to just compensation, due process of law and equal protection under the law; that USCA XIV is to be liberally construed to protect the civil rights of US Citizens against state action.

(22) Because the Honorable Lacey Thornburgh was the Attorney

General of the State of North Carolina, I respectfully request that a change of venue be granted and that the matters herein be heard and decided in the Charlotte Division of the Western District.

(23) The plaintiff has been engaged in the real estate development in N.C. and is planning to file a complaint in the Western District of North Carolina against several NCDOT engineers for the taking of his property without just compensation under diversity of citizenship and under federal statutes as well.

I, Christopher Langdon, hereby depose and state, under oath, that the facts herein are true, except those asserted on information and belief, and those matters I believe are true; that I believe that I am entitled to the relief sought herein.

Christopher Langdon, Plaintiff "s/_____."
1835 Edwin Blvd., Winter Park, Fla. 32789-
--407-647-7539
Suscribed to and sworn before me, this the
17th day of May, 2001.
Notary Public "s/_____."
Permanand Bikha
My Commission DD009669
Expires March 15th, 2005